



## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Part 17**

**[Docket Nos. FWS–R1–ES–2012–0080; FWS–R1–ES–2012–0088; FWS–R1–ES–2013–0009; FWS–R1–ES–2013–0021]**

**[4500030114]**

**RIN 1018-AY18; 1018-AZ17; 1081-AZ36; 1081-AZ37**

**Endangered and Threatened Wildlife and Plants; Listing and Designation of Critical Habitat for Taylor’s Checkerspot Butterfly, Streaked Horned Lark, and Four Subspecies of Mazama Pocket Gopher**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on our October 11, 2012 (77 FR 61938), proposal to list Taylor’s checkerspot butterfly as endangered and streaked horned lark as threatened and to designate critical habitat, and on our December 11, 2012 (77 FR 73770), proposal to list four subspecies of Mazama pocket gopher (Olympia, Tenino, Yelm, and Roy Prairie) and to designate critical habitat, under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of a draft economic analysis (DEA) of the proposed critical habitat designations and an amended required determinations section of the proposed designations. The draft economic analysis addresses the potential economic impacts of critical habitat designation for all six subspecies (collectively, the “prairie species”) under consideration in these rulemakings. In addition, we are providing information that we inadvertently omitted from the preamble to the October 11, 2012, proposed rule (77 FR 61938) to list Taylor’s checkerspot butterfly as endangered and streaked horned lark as threatened and to designate critical habitat. We are reopening the comment periods to allow all interested parties an opportunity to comment simultaneously on the proposed rules, the associated DEA, and our amended required determinations. Comments previously submitted on these proposed rulemakings do not need to be resubmitted, as they will be fully considered in preparation of the final rules. We also announce a public hearing and three public information workshops on our proposed rules and associated documents.

**DATES:** *Written Comments:* We will consider comments received or postmarked on or

before [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION]. Please note comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**) must be received by 11:59 p.m. Eastern Time on the closing date. Any comments that we receive after the closing date may not be considered in the final decisions on these actions.

*Public Information Workshops:* We will hold three public information workshops. Two in Olympia, Washington, for all six subspecies, on Tuesday, April 16, 2013, from 3 p.m. to 5 p.m. and from 6 p.m. to 8 p.m.; and another in Salem, Oregon, for Taylor's checkerspot butterfly and streaked horned lark, on Wednesday, April 17, 2013, from 6 p.m. to 8 p.m. (see **ADDRESSES**).

*Public Hearing:* We will hold a public hearing in Lacey, Washington, on Thursday, April 18, 2013, from 3 p.m. to 5 p.m. and continuing from 6 p.m. to 8 p.m. (see **ADDRESSES**).

**ADDRESSES:**

*Document Availability:* You may obtain copies of the proposed rules at <http://www.regulations.gov> at Docket No. FWS-R1-ES-2012-0080 for Taylor's checkerspot butterfly and streaked horned lark, and at Docket No. FWS-R1-ES-2012-0088 for the Mazama pocket gophers; from the Washington Fish and Wildlife Office's website (<http://www.fws.gov/wafwo/>); or by contacting the Washington Fish and Wildlife

Office directly (see **FOR FURTHER INFORMATION CONTACT**). You may obtain a copy of the combined draft economic analysis at Docket No. FWS–R1–ES–2013–0009 or Docket No. FWS–R1–ES–2013–0021.

*Written Comments:* You may submit written comments by one of the following methods, or at the public information workshop or public hearing:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. Submit comments on the listing proposal for Taylor’s checkerspot butterfly and streaked horned lark to Docket No. FWS–R1–ES–2012–0080; submit comments on the critical habitat proposal for Taylor’s checkerspot butterfly and streaked horned lark to Docket No. FWS–R1–ES–2013–0009. Submit comments on the listing proposal for Mazama pocket gophers to Docket No. FWS–R1–ES–2012–0088; submit comments on the critical habitat proposal for Mazama pocket gophers to Docket No. FWS–R1–ES–2013–0021. See **SUPPLEMENTARY INFORMATION** for an explanation of the four dockets.

(2) *By hard copy:*

- Submit comments on the listing proposal for Taylor’s checkerspot butterfly and streaked horned lark by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R1–ES–2012–0080; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

- Submit comments on the critical habitat proposal for Taylor's checkerspot butterfly and streaked horned lark by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS-R1-ES-2013-0009; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042-PDM; Arlington, VA 22203.
- Submit comments on the listing proposal for Mazama pocket gophers by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS-R1-ES-2012-0088; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042-PDM; Arlington, VA 22203.
- Submit comments on the critical habitat proposal for Mazama pocket gophers by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS-R1-ES-2013-0021; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042-PDM; Arlington, VA 22203.

*Public Information Workshops and Public Hearing:* The public information workshops will be held at the Salem Library, 585 Liberty Street SE, Salem, Oregon, 97301, and at the Lacey Community Center, 6729 Pacific Avenue SE, Lacey, Washington, 98503. The public hearing will be held in the Auditorium of Office Building 2 (OB2), 1125 Jefferson Street SE, Olympia, Washington, 98504 (across Capitol Way from the Legislative Building, on the lower level of the building). People needing reasonable accommodation in order to attend and participate in the public hearing should contact Ken S. Berg,

Manager, Washington Fish and Wildlife Office, as soon as possible (see **FOR FURTHER INFORMATION CONTACT**).

**FOR FURTHER INFORMATION CONTACT:** Ken S. Berg, Manager, Washington Fish and Wildlife Office, 510 Desmond Drive SE, Lacey, WA 98503; by telephone at 360-753-9440; or by facsimile at 360-534-9331. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

#### **SUPPLEMENTARY INFORMATION:**

##### **Public Comments**

We will accept written comments and information during this reopened comment period on our proposed rules that were published in the **Federal Register** on October 11, 2012 (77 FR 61938), and on December 11, 2012 (77 FR 73770); our combined draft economic analysis of the proposed critical habitat designations; and the amended required determinations provided in this document. We will consider all information and recommendations from all interested parties.

On October 11, 2012, we published a proposal (77 FR 61938) to list Taylor's checkerspot butterfly (*Euphydryas editha taylori*) as endangered, to list the streaked

horned lark (*Eremophila alpestris strigata*) as threatened, and to designate critical habitat for these two subspecies in Oregon and Washington. On December 11, 2012, we published a proposal (77 FR 73770) to list four subspecies of the Mazama pocket gopher (Roy Prairie [*Thomomys mazama glacialis*], Olympia [*T. m. pugetensis*], Tenino [*T. m. tumuli*], and Yelm [*T. m. yelmensis*]) as threatened, and to designate critical habitat for these four subspecies in Washington. Later this year, we will publish four separate final decisions: two final rules concerning the listing determinations described above (i.e., a final rule for Taylor's checkerspot butterfly and streaked horned lark, and another final rule for the Mazama pocket gophers), and two others concerning the critical habitat determinations described above. The final listing rule for Taylor's checkerspot butterfly and streaked horned lark will publish under the existing Docket No. FWS-R1-ES-2012-0080, and the final listing rule for the Mazama pocket gophers will publish under the existing Docket No. FWS-R1-ES-2012-0088, while the final critical habitat designations will publish separately under Docket No. FWS-R1-ES-2013-0009 and Docket No. FWS-R1-ES-2013-0021, respectively.

We request that you provide comments specifically on our proposed listing determinations for Taylor's checkerspot butterfly and streaked horned lark under Docket No. FWS-R1-ES-2012-0080 and for the Mazama pocket gophers under Docket No. FWS-R1-ES-2012-0088 (for comments on our related proposed critical habitat designations, please refer to alternate docket numbers below). We will consider information and recommendations from all interested parties. We are particularly

interested in comments concerning:

(1) Biological, commercial trade, or other relevant data concerning threats (or the lack thereof) to the subspecies proposed for listing, and regulations that may be addressing those threats.

(2) Additional information concerning the biology, range, distribution, and population sizes and trends of the subspecies proposed for listing, including the locations of any additional populations of these subspecies.

(3) Any information on the biological or ecological requirements of the subspecies proposed for listing, and ongoing conservation measures for the subspecies and their habitat.

(4) Additional information pertaining to the promulgation of a special rule to exempt existing maintenance activities and agricultural practices from section 9 take prohibitions on private and Tribal lands, including airports, where the four subspecies of *Mazama* pocket gophers and the streaked horned lark occur.

(5) Whether any populations of the streaked horned lark should be considered separately for listing as a distinct population segment (DPS), and if so, the justification for how that population meets the criteria for a DPS under the Service's Policy Regarding



the Recognition of Distinct Vertebrate Population Segments under the Endangered Species Act (61 FR 4722, February 7, 1996).

We request that you provide comments specifically on the critical habitat determination and related draft economic analysis under Docket No. FWS–R1–ES–2013–0009 for the Taylor’s checkerspot butterfly and streaked horned lark, and Docket No. FWS–R1–ES–2013–0021 for the Mazama pocket gophers. The combined draft economic analysis addresses the potential economic impacts of critical habitat designation for all six subspecies under consideration (collectively, the “Prairie Species of Western Washington and Oregon,” referred to in this document as the “prairie species”). We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(6) The reasons why we should or should not designate areas for the prairie species as “critical habitat” under section 4 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), including whether there are threats to the prairie species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(7) Specific information on:

- The amount and distribution of critical habitat for each of the prairie species;
- Areas in the geographic area occupied at the time of listing and that contain the physical or biological features essential for the conservation of each of the prairie species;
- Whether special management considerations or protections may be required for the physical or biological features essential to the conservation of these species; and
- What areas not currently occupied are essential to the conservation of each of the prairie species and why.

(8) Land use designations and current or planned activities in the areas occupied or unoccupied by the species and proposed as critical habitat, and the possible impacts of these activities on each of the prairie species, or of critical habitat on these designations or activities.

(9) Any foreseeable economic, national security, or other relevant impacts of designating any area as critical habitat. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas that may experience these impacts.

(10) Whether the benefits of excluding any particular area from critical habitat outweigh the benefits of including that area as critical habitat under section 4(b)(2) of the

Act, after considering the potential impacts and benefits of the proposed critical habitat designation. We are considering the possible exclusion of non-Federal lands, especially areas in private ownership, and whether the benefits of exclusion may outweigh the benefits of inclusion of those areas. We, therefore, request specific information on:

- The benefits of including any specific areas in the final designation and supporting rationale.
- The benefits of excluding any specific areas from the final designation and supporting rationale.
- Whether any specific exclusions may result in the extinction of any of the prairie species and why.

For private lands in particular, we are interested in information regarding the potential benefits of including private lands in critical habitat versus the benefits of excluding such lands from critical habitat. This information does not need to include a detailed technical analysis of the potential effects of designated critical habitat on private property. In weighing the potential benefits of exclusion versus inclusion of private lands, the Service may consider whether existing partnership agreements provide for the management of the subspecies. We may consider, for example, the status of conservation efforts, the effectiveness of any conservation agreements to conserve the subspecies, and the likelihood of the conservation agreement's future implementation. We request

comment on the broad public benefits of encouraging collaborative efforts and encouraging local and private conservation efforts.

(11) The possible exclusion of lands under Port of Portland ownership from Critical Habitat Unit 3-O for the streaked horned lark. The Service has received a draft Candidate Conservation Agreement with Assurances from the Port of Portland for conservation of the streaked horned lark at Portland International Airport and at a new mitigation site (Government Island). If this plan is finalized prior to the issuance of our final rule, we may consider the exclusion of this site from the final designation of critical habitat, following evaluation of the agreement according to our criteria as described in our proposed rule (October 11, 2012; 77 FR 61938; see *Exclusions under section 4(b)(2) of the Act*).

(12) Our process used for identifying those areas that meet the definition of critical habitat for each of the six subspecies, as described in the section of the proposed rules for Taylor's checkerspot butterfly and streaked horned lark (October 11, 2012; 77 FR 61938) and the Mazama pocket gophers (December 11, 2012; 77 FR 73770) titled "Criteria Used to Identify Critical Habitat."

(13) Information on the extent to which the description of potential economic impacts in the draft economic analysis is complete and accurate.

(14) Whether the draft economic analysis makes appropriate assumptions regarding current practices and any regulatory changes that will likely occur as a result of the designation of critical habitat.

(15) Whether the draft economic analysis identifies all Federal, State, and local costs and benefits attributable to the proposed designation of critical habitat, and information on any costs that may have been inadvertently overlooked.

(16) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(17) Specific information on ways to improve the clarity of this rule as it pertains to completion of consultations under section 7 of the Act.

Our final determinations concerning listing Taylor's checkerspot butterfly as an endangered species, streaked horned lark as a threatened species, and the four Mazama pocket gopher subspecies as threatened species and designating critical habitat for all of these subspecies in Washington and Oregon will take into consideration all written comments we receive during the comment periods for each species, from peer reviewers, and during the public information workshops, as well as comments and public testimony we may receive during the public hearing. The comments will be included in the public

record for this rulemaking, and we will fully consider them in the preparation of our final determinations. On the basis of peer reviewer and public comments, as well as any new information we may receive, we may, during the development of our final determination concerning critical habitat, find that areas within the proposed critical habitat designation do not meet the definition of critical habitat, that some modifications to the described boundaries are appropriate, or that areas may or may not be appropriate for exclusion under section 4(b)(2) of the Act. Our final determination of critical habitat may therefore differ from the proposed designation.

If you submitted comments or information on the proposed rule for Taylor's checkerspot butterfly and streaked horned lark (October 11, 2012; 77 FR 61938) during the comment period from October 11, 2012, to December 10, 2012, or on the proposed rule for the Mazama pocket gophers (December 11, 2012; 77 FR 73770) during the comment period from December 11, 2012, to February 11, 2013, please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in the preparation of our final determinations.

You may submit your comments and materials concerning the proposed rules or draft economic analysis by one of the methods listed in the **ADDRESSES** section. Verbal testimony may also be presented during the public hearing (see **DATES** and **ADDRESSES** sections). We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. If you submit your comment

via U.S. mail, you may request at the top of your document that we withhold personal information such as your street address, phone number, or e-mail address from public review; however, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as some of the supporting documentation we used in preparing the proposed rules and draft economic analysis, will be available for public inspection on <http://www.regulations.gov> at Docket Nos. FWS–R1–ES–2012–0080 and FWS–R1–ES–2013–0009 for the Taylor’s checkerspot butterfly and streaked horned lark, and Docket Nos. FWS–R1–ES–2012–0088 and FWS–R1–ES–2013–0021 for the Mazama pocket gophers. All comments and materials we receive, and all supporting documentation, are available for public inspection by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

#### *Public Information Workshops and Public Hearing*

We are holding three public information workshops and a public hearing on the dates listed in the **DATES** section at the addresses listed in the **ADDRESSES** section (above). We are holding the public hearing to provide interested parties an opportunity to present verbal testimony (formal, oral comments) or written comments regarding the proposed listing of Taylor’s checkerspot butterfly as an endangered species, streaked horned lark as a threatened species, and four subspecies of Mazama pocket gophers as

threatened species; the proposed designation of critical habitat for these six subspecies in Washington and Oregon; and the associated draft economic analysis of the proposed critical habitat designations. A formal public hearing is not, however, an opportunity for dialogue with the Service; it is only a forum for accepting formal verbal testimony. In contrast to the hearing, the public information workshops will allow the public the opportunity to interact with Service staff, who will be available to provide information and address questions on the proposed rules and the associated draft economic analysis. We cannot accept verbal testimony at the public information workshops; verbal testimony can only be accepted at the public hearing. Anyone wishing to make an oral statement at the public hearing for the record is encouraged to provide a written copy of their statement to us at the hearing. At the public hearing, formal verbal testimony will be transcribed by a certified court reporter and will be fully considered in the preparation of our final determination. In the event there is a large attendance, the time allotted for oral statements may be limited. Speakers can sign up at the hearing if they desire to make an oral statement. Oral and written statements receive equal consideration. There are no limits on the length of written comments submitted to us.

Persons with disabilities needing reasonable accommodations to participate in the public information workshop or public hearing should contact Ken S. Berg, Manager, Washington Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). Reasonable accommodation requests should be received at least 3 business days prior to the public information workshop or public hearing to help ensure



availability; at least 2 weeks prior notice is requested for American Sign Language needs.

## **Background**

The topics discussed below are relevant to designation of critical habitat for Taylor's checkerspot butterfly and streaked horned lark in Washington and Oregon and designation of critical habitat for four subspecies of *Mazama* pocket gophers in Washington. For more information on the proposed listings and proposed designations of critical habitat for these prairie species, please refer to the proposed rules published in the **Federal Register** on October 11, 2012 (77 FR 61938) and December 11, 2012 (77 FR 73770), which are available online at <http://www.regulations.gov> (at Docket No. FWS–R1–ES–2012–0080 and Docket No. FWS–R1–ES–2012–0088) or from the Washington Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). In addition, please see the section *Addition to the Proposed Rule for the Listing of Taylor's Checkerspot Butterfly and Streaked Horned Lark and Designation of Critical Habitat*, below.

### *Previous Federal Actions*

On October 11, 2012, we published a proposed rule (77 FR 61938) to list Taylor's checkerspot butterfly as endangered and streaked horned lark as threatened and to designate critical habitat. We proposed to designate a total of 6,875 acres (ac) (2,782

hectares (ha)) in Washington and Oregon as critical habitat for the Taylor's checkerspot butterfly, and 12,159 ac (4,920 ha) in Washington and Oregon for the streaked horned lark. Within that proposed rule, we announced a 60-day comment period, which ended on December 10, 2012. Approximately 17 percent of the proposed designation for the streaked horned lark overlaps areas that are currently designated as critical habitat for the western snowy plover (*Charadrius alexandrinus nivosus*) (77 FR 36728; June 19, 2012).

On December 11, 2012, we published a proposed rule (77 FR 73770) to list four subspecies of Mazama pocket gopher (Olympia, Tenino, Yelm, and Roy Prairie) as threatened and to designate critical habitat. We proposed to designate a total of 9,234 acres (ac) (3,737 ha) in Washington. Within that proposed rule, we announced a 60-day comment period, which ended on February 11, 2013. The proposed designation for the Mazama pocket gophers overlaps some of the areas that are currently proposed as critical habitat for Taylor's checkerspot butterfly and streaked horned lark. We will submit final determinations on the proposed listing and critical habitat designations for the prairie species to the **Federal Register** on or before September 30, 2013, for publication.

*Addition to the Proposed Rule for the Listing of Taylor's Checkerspot Butterfly and Streaked Horned Lark and Designation of Critical Habitat*

On October 11, 2012, we published in the **Federal Register** (77 FR 61938) a proposed rule to list the Taylor's checkerspot butterfly as endangered, to list the streaked

horned lark as threatened, and to designate critical habitat for each of these subspecies.

In the preamble of that proposed rule, we inadvertently omitted some text from the section *Criteria Used to Identify Critical Habitat*. Here, we print, in full, the description of the criteria used to identify critical habitat for the Taylor's checkerspot butterfly and streaked horned lark.

*Criteria Used to Identify Critical Habitat [Taylor's Checkerspot Butterfly and Streaked Horned Lark]*

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available to designate critical habitat. We review available information pertaining to the habitat requirements of the species, and begin by assessing the specific geographic areas occupied by the species at the time of listing. If such areas are not sufficient to provide for the conservation of the species, in accordance with the Act and its implementing regulations at 50 CFR 424.12(e), we then consider whether designating additional areas outside the geographic areas occupied at the time of listing may be essential to ensure the conservation of the species. We consider unoccupied areas for critical habitat when a designation limited to the present range of the species may be inadequate to ensure the conservation of the species. In this case, since we are proposing listing simultaneously with the proposed critical habitat, all areas presently occupied by the Taylor's checkerspot butterfly or streaked horned lark are presumed to constitute those areas occupied at the time of listing; those areas currently occupied by the

subspecies are identified as such in each of the unit or subunit descriptions below. These descriptions similarly identify which of the units or subunits are believed to be unoccupied at the time of listing. Our determination of the areas occupied at the time of listing, and our rationale for how we determined specific unoccupied areas to be essential the conservation of the subspecies, are provided below.

We plotted the known locations of the Taylor's checkerspot butterfly and streaked horned lark where they occur in Washington and Oregon using 2011 NAIP digital imagery in ArcGIS, version 10 (Environmental Systems Research Institute, Inc.), a computer geographic information system program.

To determine if the currently occupied areas contain the primary constituent elements, we assessed the life-history components and the distribution of both subspecies through element occurrence records in State natural heritage databases and natural history information on each of the subspecies as they relate to habitat. We first considered whether the presently occupied areas were sufficient to conserve the species. If not, to determine if any unoccupied sites met the criteria for critical habitat, we then considered: (1) The importance of the site to the overall status of the subspecies to prevent extinction and contribute to future recovery of the subspecies; (2) whether the area presently provides the essential physical or biological features, or could be managed and restored to contain the necessary physical and biological features to support the subspecies; and (3) whether individuals were likely to colonize the site. We also considered the potential for

reintroduction of the subspecies, where anticipated to be necessary (for Taylor's checkerspot butterfly only).

### *Occupied Areas*

#### Taylor's Checkerspot Butterfly

For Taylor's checkerspot butterfly, we are proposing to designate critical habitat within the geographical area occupied by the species at the time of listing, as well as in unoccupied areas that we have determined to be essential to the conservation of the species (described below). These presently occupied areas provide the physical or biological features essential to the conservation of the species, which may require special management considerations or protection. We determined occupancy in these areas based on recent survey information. All sites occupied by the Taylor's checkerspot butterfly have survey data as recently as 2011, except for the Forest Service sites on the north Olympic Peninsula where data are as recent as 2010 (Potter, 2011; Linders 2011; Ross 2011; Holtrop 2010, Severns and Grossboll 2011). In addition, there have been some recent experimental translocations of Taylor's checkerspot butterfly to sites where it had been extirpated within its historical range. If translocated populations have been documented as successfully reproducing, we considered those sites to be presently occupied by the subspecies. Areas proposed as critical habitat for the Taylor's checkerspot butterfly are representative of the known historical geographic distribution

for the species, outside of Canada.

### Streaked Horned Lark

For the streaked horned lark, we are proposing critical habitat within the geographical area occupied by the subspecies at the time of listing, with the exception of a single subunit that is currently unoccupied (described below). We determined occupancy for the streaked horned lark based on recent survey data (Anderson 2011; Linders 2011; Moore 2011), and assumptions about occupancy based on known recent presence of the subspecies and continuing availability of suitable habitat. Not all known streaked horned lark sites are surveyed every year due to budget and staffing limitations, and due to the inaccessibility of some of the sites. If we have recent information on the presence of streaked horned larks and if the site has the habitat characteristics required by the species, we assume that streaked horned larks persist at the site. We consider it reasonable to presume a site is occupied by the streaked horned lark if individuals have been detected during the breeding season within the last several years and if the site receives consistent management that provides the early seral characteristics required by the subspecies (e.g., regular maintenance at airports) or if it retains the essential habitat features for the subspecies (e.g., dredge material has been deposited at the site within the last 5 years).

We are not proposing to designate critical habitat in the agricultural fields in the Willamette Valley, because we are unable to determine which areas within the large agricultural matrix in the valley will meet the definition of critical habitat at any time. Agricultural habitats can provide appropriate habitat conditions, but these conditions (large, open landscape context, low stature vegetation, bare ground) occur unpredictably and vary in location from year to year. Large areas of bare ground and sparse vegetation likely occur somewhere within the Willamette Valley every year, as fields are newly planted, mowed, burned, tilled, or perhaps as planted crops fail for various reasons. However, the occurrence of these shifting habitats within more than a million acres of agricultural fields is unpredictable. For these reasons, we have no basis for concluding that any specific areas are essential for conservation, because we have no way of knowing where or how long the appropriate conditions will persist.

Even though we cannot determine the location of the physical and biological factors and primary constituent elements on agricultural lands in the Willamette Valley, we acknowledge that agricultural lands in the Willamette Valley are important and will be necessary for recovery of the streaked horned lark.

#### *Unoccupied Areas*

We are proposing critical habitat in areas unoccupied at the time of listing, but that we have determined to be essential to the conservation of the subspecies for the

Taylor's checkerspot butterfly (multiple subunits) and the streaked horned lark (a single subunit).

#### Taylor's Checkerspot Butterfly

We are proposing 11 subunits as critical habitat for the Taylor's checkerspot butterfly that are not presently occupied by the subspecies. There has been a rapid decline in the spatial distribution of prairies (grassland habitat) throughout the range of Taylor's checkerspot butterfly. There are two primary drivers of habitat loss for the subspecies across its range: development and changes in the vegetative cover across the landscape. One of the primary threats to the persistence of the Taylor's checkerspot butterfly is loss of habitat due to successional changes that occur when habitat is not subject to disturbance or does not receive special management. These changes in the vegetative structure are due to the encroachment of large shade-producing trees, shrubs, and invasive sod-forming grasses that outcompete native grassland plants for water, space, light, and nutrients, which in turn effects the vegetative composition of these sites. Changes from one vegetative form to another have degraded many of the historical Taylor's checkerspot butterfly sites. As a result, the present distribution of Taylor's checkerspot butterfly is disjunct and isolated throughout the subspecies' historical range. If the Taylor's checkerspot butterfly is to recover, there must be sufficient suitable habitat available for population expansion and growth that is connected in such a way as to allow for dispersal, and these sites must receive routine and sustained management to maintain



the early seral conditions essential to the conservation of the species.

For this proposed critical habitat, we first identified the areas presently occupied by Taylor's checkerspot butterfly and that provide the physical or biological features essential to the conservation of the species. We then determined that the designation of these areas as critical habitat would not be sufficient to provide for the conservation of Taylor's checkerspot butterfly, because, as described above, the distribution and abundance of the subspecies has declined so dramatically in recent years that presently occupied sites are too isolated and disjunct to provide for long-term viability. We therefore evaluated areas outside the presently occupied patches to identify unoccupied habitat areas essential for the conservation of the species. We propose to designate some areas adjacent to all known occurrences of Taylor's checkerspot butterfly but that may currently be unoccupied to provide for population expansion and growth. Areas outside of occupied habitat utilized by Taylor's checkerspot butterflies are proposed as many occupied sites are extremely small, and if populations are to expand for long-term viability they will need sufficient space for shelter, breeding, and larval and adult feeding to accommodate greater numbers of individuals. In addition, we are proposing to designate some specific areas outside the geographical area occupied by the species at the time of listing that were historically occupied, but are presently unoccupied. These unoccupied areas are proposed because they are sites where Taylor's checkerspot butterfly was recently extirpated, but that are currently receiving restoration specifically aimed to enhance Taylor's checkerspot butterfly habitat. These areas would likely be

sites that would receive captively bred and translocated Taylor's checkerspots to achieve the recovery of the subspecies, as this technique for reoccupying former sites has been successfully tested at several locations (Scatter Creek south and Range 50, JBLM). We are also proposing one presently unoccupied site (Smith Prairie) because of the high potential for reintroduction success, due to the presence of potentially suitable habitat and landowner commitment to the conservation of Taylor's checkerspot butterfly. Each of the presently unoccupied but essential sites proposed for critical habitat additionally provide some or all of the PCEs for the Taylor's checkerspot butterfly. The primary reason for proposing to designate critical habitat in previously occupied areas (and the single unoccupied non-historical site at Smith Prairie) is to enable the reintroduction and reestablishment of the species broadly throughout its historical range to ensure its long-term persistence. Due to the geographic distribution of these unoccupied sites, they provide areas for the future translocation and subsequent dispersal of captively bred Taylor's checkerspot butterflies to achieve the conservation of the species.

We have identified these unoccupied areas as essential to the conservation of the Taylor's checkerspot butterfly because they are located strategically between, and in some cases, adjacent to, occupied areas from which the butterfly may disperse; these areas contain one or more of the PCEs for the butterfly; and are all receiving or are slated to receive restoration treatments that will increase the amount of suitable habitat available.

## Streaked Horned Lark

For the streaked horned lark, we propose one subunit, Coffeepot Island in the Columbia River, which may not be occupied at the time of listing, and that we have therefore evaluated as if it were unoccupied to determine whether it is nonetheless essential to the conservation of the subspecies. Occupancy by the streaked horned lark was last documented on Coffeepot Island in 2004. Surveys since this time have been intermittent, and changes in the vegetation structure have diminished the likelihood that streaked horned larks will use Coffeepot Island in the absence of restoration. Subsequent to our identification of all areas presently occupied by the species and that provide the physical or biological features essential to the conservation of the streaked horned lark, we determined that Coffeepot Island is essential to the conservation of the subspecies because it provides an essential “stepping stone” in the chain of breeding sites on the islands in the Columbia River. In addition, the island is being considered as a dredge deposit site, which will recreate the necessary PCEs for occupancy by breeding streaked horned larks in the future. We have therefore determined that although presently unoccupied, Coffeepot Island is essential to the conservation of the streaked horned lark.

In all cases, when determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement (such as airport runways and roads), and other structures because such lands lack the essential physical or biological features for Taylor’s checkerspot butterfly or

streaked horned lark, with the exception of graveled margins of the airport runways and taxiways. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of the proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We are proposing four units of critical habitat for designation based on sufficient elements of physical and biological features being present to support life-history processes for the Taylor's checkerspot butterfly and streaked horned lark. These 4 units are further divided into 47 subunits, some of which contain proposed critical habitat for both subspecies. Some subunits within the units contain all of the identified elements of physical and biological features and support multiple life-history processes. Some subunits contain only some elements of the physical and biological features necessary to support the subspecies' particular use of that habitat. Because we determined that the areas presently occupied by the Taylor's checkerspot butterfly and the streaked horned lark are not sufficient to provide for the conservation of these subspecies, we have additionally identified some subunits that are presently unoccupied, but that we have

determined to be essential to the conservation of the species. Therefore, we are also proposing these unoccupied areas as critical habitat for the Taylor's checkerspot butterfly and streaked horned lark.

We invite public comment on our identification of those areas presently occupied by Taylor's checkerspot butterfly or streaked horned lark and provide the physical or biological features that may require special management considerations or protection, as well as areas that are currently unoccupied but that we have determined to be essential to the conservation of the subspecies.

#### *Critical Habitat*

Section 3 of the Act defines critical habitat as those specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency unless it is exempted pursuant to the provisions of the Act (16 U.S.C. 1536(e)-(n) and (p)). Federal agencies proposing actions affecting critical habitat must

consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Consistent with the best scientific data available, the standards of the Act, and our regulations, we have initially identified, for public comment, a total of 6,875 ac (2,782 ha) in 3 units (18 subunits) for Taylor's checkerspot butterfly and 12,159 ac (4,920 ha) in 3 units (29 subunits) for streaked horned lark, located in Washington and Oregon, and a total of 9,234 acres (ac) (3,737 ha) in 1 unit (8 subunits) for four subspecies of Mazama pocket gophers in Washington, that meet the definition of critical habitat for each of these subspecies. In addition, the Act provides the Secretary with the discretion to exclude certain areas from the final designation after taking into consideration economic impacts, impacts on national security, and any other relevant impacts of specifying any particular area as critical habitat.

#### **Consideration of Impacts Under Section 4(b)(2) of the Act**

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species, and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat. In the case of the Taylor's checkerspot butterfly, streaked horned lark, and Mazama pocket gophers, the benefits of critical habitat include public awareness of the presence of one or more of these subspecies and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on Federal lands or for projects undertaken by Federal agencies.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. We also consider the potential economic impacts that may result from the designation of critical habitat.

In the proposed rule, we identified several areas to consider excluding from the final rule. We are considering excluding from the final designation for Taylor's checkerspot butterfly approximately 1,394 ac (565 ha) of State, county, and private lands that have either a perpetual conservation easement, voluntary conservation agreement, conservation or watershed preserve designation, or similar conservation protection; for streaked horned lark, approximately 182 ac (73 ha) of habitat that may be managed and protected for the western snowy plover, streaked horned lark, and other native coastal species of cultural significance on lands under Shoalwater Tribal ownership and management; and for the Mazama pocket gophers, approximately 512 ac (207 ha) of State and private lands that have either a habitat conservation plan (HCP), voluntary conservation agreement, or similar conservation protection.

In addition, the Port of Portland is in the process of developing a Candidate Conservation Agreement with Assurances for the conservation of the streaked horned lark on their property within the proposed designation. If this plan is finalized prior to the issuance of our final rule, we may consider the exclusion of 414 ac (167 ha) from the final critical habitat for the streaked horned lark, following evaluation of the agreement according to our criteria as described in our proposed rule (October 11, 2012; 77 FR 61938; see *Exclusions under section 4(b)(2) of the Act*).

These specific exclusions will be considered on an individual basis or in any combination thereof. In addition, the final designations may not be limited to these



exclusions, but may also consider other exclusions as a result of continuing analysis of relevant considerations (scientific, economic, and other relevant factors, as required by the Act) and the public comment process. In particular, we solicit comments from the public on whether all of the areas identified meet the definition of critical habitat, whether other areas would meet that definition, whether to make the specific exclusions we are considering, and whether there are other areas that are appropriate for exclusion.

The final decision on whether to exclude any area will be based on the best scientific data available at the time of the final designations, including information obtained during the comment periods and information about the economic impact of the designations. Accordingly, we have prepared a draft economic analysis concerning the proposed critical habitat designations, which is available for review and comment (see **ADDRESSES** section, above, and *Draft Economic Analysis* section, below).

#### **Application of Section 4(a)(3) of the Act**

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement,

and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: “The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.”

Critical habitat is proposed on Department of Defense lands in the State of Washington for all six prairie species; all of these lands are on Joint Base Lewis-McChord (JBLM). As described in our proposed rules (October 11, 2012, 77 FR 61938; and December 11, 2012; 77 FR 73770), although JBLM’s INRMP has the potential to provide a conservation benefit to the Taylor’s checkerspot butterfly, streaked horned lark, and Mazama pocket gophers, it does not at present. Since JBLM’s INRMP is currently undergoing revision and is subject to change, we have reserved judgment on whether management under the new INRMP will meet our criteria for exemption from critical habitat at this time. If we determine prior to our final rulemaking that conservation efforts identified in the newly revised INRMP will provide a conservation benefit to the

species identified previously, we may at that time exempt the identified JBLM lands from the final designation of critical habitat.

### *Draft Economic Analysis*

The purpose of the draft economic analysis (DEA) (IEc 2013) is to identify and analyze the potential economic impacts associated with the proposed critical habitat designations for the six prairie species: Taylor's checkerspot butterfly, streaked horned lark, and the Roy Prairie, Olympia, Tenino, and Yelm subspecies of the Mazama pocket gopher.

The DEA describes the economic impacts of potential conservation efforts for the six prairie species; some of these costs will likely be incurred regardless of whether we designate critical habitat. The economic impact associated with the proposed critical habitat designation is analyzed by comparing scenarios "with critical habitat" and "without critical habitat." The "without critical habitat" scenario represents the baseline for the analysis, considering protections that would be in place for these species should they be listed under the Act (e.g., under Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The "with critical habitat" scenario describes the incremental impacts associated specifically with the designation of critical habitat for the six prairie species. The incremental conservation efforts and associated impacts are those not expected to

occur absent the designation of critical habitat for these six prairie species. In other words, the “incremental” costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat when evaluating the benefits of excluding particular areas under section 4(b)(2) of the Act.

The "without critical habitat" scenario represents the baseline for the analysis, and considers the protections that would be afforded each of the six subspecies through listing under the Act regardless of critical habitat designation. The baseline for this analysis is the state of regulation, absent designation of critical habitat, which provides protection to the species under the Act, as well as under other Federal, State, and local laws and conservation plans. The baseline includes sections 7, 9, and 10 of the Act to the extent that they are expected to apply absent the designation of critical habitat for the species. Baseline costs are not included in the estimated economic impacts of critical habitat, because the Act provides for the consideration of economic, national security, and other relevant impacts only in association with the designation of critical habitat (section 4(b)(2) of the Act); the listing of a species, on the other hand, is limited to a determination based solely on the best scientific and commercial data available (section 4(b)(1)(A) of the Act).

The analysis qualitatively describes how baseline conservation for the Taylor's checkerspot butterfly, streaked horned lark, and Mazama pocket gophers would be implemented across the proposed designation if we finalize the listing of these subspecies in order to provide context for the incremental analysis, which separates the costs attributable to critical habitat designation from those associated with listing (Chapter 3 of the DEA). The "with critical habitat" scenario describes and monetizes the incremental impacts due specifically to the designation of critical habitat for the six prairie species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat, and constitute the potential incremental costs attributed to critical habitat over and above those baseline costs attributed to listing. For a further description of the methodology of the analysis, see Chapter 2, "Framework for the Analysis," of the DEA.

The DEA provides estimated costs of the foreseeable potential economic impacts of the proposed critical habitat designation for the six prairie species over the next 20 years, which was determined to be the appropriate period for analysis due to the absence of specific information on the expected timeframe for recovery of the species, and because limited planning information is available for most activities to reliably forecast activity levels for projects beyond a 20-year timeframe. The DEA identifies potential incremental costs that may be incurred as a result of the proposed critical habitat designation; as described above, these are those costs attributed to critical habitat over

and above those baseline costs attributed to listing.

In the DEA, we concentrated on the activities of primary concern with respect to potential adverse modification of critical habitat. The key concern is the potential for activities to result in habitat alteration within a critical habitat unit. Our analysis therefore focuses on the following activities:

- Military activities;
- Recreation and habitat management;
- Airports and agricultural activities;
- Transportation;
- Electricity distribution and forestry activities; and
- Dredging activities.

Within these activity categories, we focus our analysis on those projects and activities that are considered reasonably likely to occur within the proposed critical habitat area. This includes projects or activities that are currently planned or proposed, or that permitting agencies or land managers indicated are likely to occur.

When a species is federally listed as an endangered or threatened species, it receives protection under the Act. For example, under section 7 of the Act, Federal agencies must consult with the Service to ensure that actions they fund, authorize, or

carry out do not jeopardize the continued existence of the species (referred to as a “jeopardy analysis”). The economic impacts of conservation measures undertaken to avoid jeopardy to the species are considered baseline impacts in our analysis, as they are not generated by the critical habitat designation, and represent costs that would be incurred regardless of whether critical habitat is designated. In other words, baseline conservation measures and associated economic impacts are not affected by decisions related to critical habitat designation for these species. Baseline protections accorded listed species under the Act and other Federal and State regulations and programs are described in Chapter 2 and 3 of the DEA.

The only Federal regulatory effect of the designation of critical habitat is the prohibition on Federal agencies taking actions that are likely to adversely modify or destroy critical habitat. They are not required to avoid or minimize effects unless the effects rise to the level of destruction or adverse modification as those terms are used in section 7 of the Act. Even then, the Service must recommend reasonable and prudent alternatives that can be implemented consistent with the intended purpose of the action, that are within the scope of the Federal agency’s legal authority and jurisdiction, and that are economically and technologically feasible. Thus, while the Service may recommend conservation measures, unless the action is likely to destroy or adversely modify critical habitat, implementation of recommended measures is voluntary and Federal agencies and applicants have discretion in how they carry out their mandates under section 7 of the Act.

Thus, the direct, incremental impacts of critical habitat designation stem from the consideration of the potential for destruction or adverse modification of critical habitat during section 7 consultations. The two categories of direct, incremental impacts of critical habitat designation are: (1) The additional administrative costs of conducting section 7 consultation related to critical habitat; and (2) implementation of any conservation efforts requested by the Service through section 7 consultation, or required by section 7 to prevent the destruction or adverse modification of critical habitat.

The DEA describes the types of project modifications that would likely be recommended by the Service, as well as other State and local conservation plans, to avoid jeopardy to Taylor's checkerspot butterfly, streaked horned lark, and the Roy Prairie, Olympia, Tenino, and Yelm subspecies of the Mazama pocket gopher should they be listed under a final rule (i.e., potential baseline conservation efforts). These project modifications would be considered part of the baseline in areas occupied by any of the six prairie species because they would be recommended regardless of whether critical habitat is designated, for the purpose of avoiding jeopardy to the listed species present. Although the standards for jeopardy and adverse modification of critical habitat are not the same, because the degradation or loss of habitat is a key threat to each of the six prairie species, our jeopardy analyses for these species would already consider the potential for project modifications to avoid the destruction of habitat; therefore recommendations to avoid jeopardy would also likely avoid adverse modification or



destruction of critical habitat for these species. Because the ability of each of the prairie species to exist is very closely tied to the quality of their habitats, significant alterations of their occupied habitat may result in jeopardy as well as adverse modification.

Therefore, the Service anticipates that section 7 consultation analyses will likely result in no difference between recommendations to avoid jeopardy or adverse modification in occupied areas of habitat. The Service extends this conclusion to certain subunits populated by the streaked horned lark, in instances where the species may be temporarily absent due to its migratory behavior (in other words, areas utilized by the lark are considered occupied for the purposes of section 7 consultation, even if the lark is seasonally absent). In addition, a significant area of proposed critical habitat for the lark is already designated as critical habitat for the western snowy plover, the conservation measures for which provide additional protection that is considered part of the baseline.

Unoccupied habitat is analyzed differently. Project modifications suggested by the Service in subunits unoccupied by the subject species would not be made under the jeopardy standard imposed by the presence of a listed species. Rather, in unoccupied subunits, any project modifications that may arise would be attributable to the consideration under section 7 consultation of possible destruction or adverse modification of critical habitat; hence any such modifications would be a consequence of the critical habitat designation. Any changes that result in an impact on economic activity, therefore, would be characterized as incremental rather than baseline impacts.

Of the proposed critical habitat subunits, a total of 12 are not occupied by one of the subspecies for which they are proposed (11 for the Taylor's checkerspot butterfly, and 1 for the streaked horned lark). While the analysis allows for the possibility of incremental project modifications within these subunits, in practice we expect few incremental impacts to occur. This conclusion is based first on the significant overlap of these sites with existing conserved areas and habitat conservation plans, minimizing the need for material additional conservation activities as a result of critical habitat designation. In addition, incremental impacts for subunits unoccupied by Taylor's checkerspot butterfly are not expected in those subunits shared with any of the Mazama pocket gopher subspecies, as conservation measures for the gopher are expected to coincide year-round with measures that may also be recommended for the Taylor's checkerspot butterfly.

The one area where some incremental impacts may occur is located on Joint Base Lewis-McChord (JBLM). Three distinct parcels within this site contain unoccupied habitat for the Taylor's checkerspot butterfly and experience regular recreational use. Importantly, none of these parcels overlaps with habitat for any of the Mazama pocket gopher subspecies. But for these JBLM areas, the analysis concludes that incremental impacts of critical habitat designation will be limited to additional administrative costs to the Service, Federal agencies, and private third parties of considering critical habitat as part of section 7 consultation.

The designation of critical habitat may, under certain circumstances, affect actions that do not have a Federal nexus and thus are not subject to the provisions of section 7 under the Act. Indirect impacts are those unintended changes in economic behavior that may occur outside of the Act, through other Federal, State, or local actions, and that are caused by the designation of critical habitat. Chapter 2 of the DEA discusses the common types of indirect impacts that may be associated with the designation of critical habitat, such as potential time delays, regulatory uncertainty, and negative perceptions related to critical habitat designation on private property. These types of impacts are not always considered incremental. In the case that these types of conservation efforts and economic effects are expected to occur regardless of critical habitat designation, they are appropriately considered baseline impacts in this analysis.

Critical habitat may generate incremental economic impacts through implementation of additional conservation measures (beyond those recommended in the baseline) and additional administrative effort in section 7 consultation to ensure that projects or activities do not result in adverse modification of critical habitat. However, as described above and in Chapter 3 of the DEA, where critical habitat is considered occupied by any of the prairie species, critical habitat designation is expected to have a more limited effect on economic activities, since section 7 consultation would already occur due to the presence of the species. Although we recognize that the standards for jeopardy and adverse modification of critical habitat are not the same, with the former focusing more closely on effects to conservation of the species, in this case and for the

reasons described above, the designation of critical habitat in occupied areas would likely result only in incremental effects over and above the costs associated with consultation due to the presence of the species. Furthermore, where proposed critical habitat for the streaked horned lark overlaps with the existing critical habitat designation for the western snowy plover, economic activities are already subject to conservation measures that would benefit the streaked horned lark and its critical habitat. The focus of the DEA is projects that are reasonably likely to occur, including but not limited to activities that are currently authorized, permitted, or funded, or for which proposed plans are currently available to the public. All of the projects considered reasonably likely to occur in the DEA are in units that are occupied by at least one of the prairie species, with the exception of recreation activities on unoccupied subunits on JBLM described above. Critical habitat designation is therefore expected to have a limited incremental impact in most areas.

For all ongoing and currently planned projects identified in the DEA, conservation offsets have been implemented or are currently being planned, even absent critical habitat designation that the Service believes may also avoid adverse modification, although such projects would need to be evaluated on a case-by-case basis if and when critical habitat is designated. Therefore, for most of these projects, incremental impacts of critical habitat designation are expected to be limited to the costs of additional administrative effort in section 7 consultations to consider adverse modification, as described in Chapter 3 of the DEA. The exception is some unoccupied subunits on

JBLM currently utilized for recreation that the DEA anticipates incurring some level of unquantified incremental impacts to recreation.

The DEA monetizes the incremental impacts of critical habitat designation where sufficient data are readily available. We estimate that the critical habitat designations for all six prairie species would result in a total present value impact of approximately \$793,574 (7 percent discount rate) to activities across all proposed units (a total annualized impact of \$70,007 over 20 years). Airport and agricultural activities are likely to be subject to the greatest incremental impacts at \$550,000 over the next 20 years, followed by recreation and habitat management at \$110,000, military activities at \$55,000, transportation at \$34,000, and electricity distribution and forestry activities at \$9,300. Of these costs, the analysis estimates that approximately 51 percent will be incurred by the Service, 31 percent by Federal action agencies, and 18 percent by third parties. In other words, Federal agencies will incur approximately 82 percent of the estimated economic impacts of the designation.

As stated earlier, we are soliciting data and comments from the public on the draft economic analysis and our amended required determinations section, as well as all aspects of the proposed rules. The final rules may reflect revisions to the proposed rules or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if the Secretary determines that the benefits of excluding the area outweigh the benefits of

including the area, provided the exclusion will not result in the extinction of the species.

### **Required Determinations—Amended**

In our October 11, 2012 (77 FR 61938), and December 11, 2012 (77 FR 73770), proposed rules, we indicated that we would defer our determination of compliance with some statutes and executive orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the draft economic analysis. We have now made use of the draft economic analysis data to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Orders (E.O.s) 12866 and 13563 (Regulatory Planning and Review), E.O. 12630 (Takings), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951). However, based on the draft economic analysis data, we are amending our required determinations concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and E.O. 13211 (Energy, Supply, Distribution, and Use).

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Based on our draft economic analysis of the proposed designation, we are certifying that the critical habitat designation for the six prairie species, if adopted as proposed, will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration (SBA), small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5

million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

The regulatory mechanism through which critical habitat protections are enforced is section 7 of the Act, which directly regulates only those activities carried out, funded, or permitted by a Federal agency. By definition, Federal agencies are not considered small entities, although the activities they may fund or permit may be proposed or carried out by small entities. Given the SBA guidance described above, our analysis considers the extent to which this designation could potentially affect small entities, regardless of whether these entities would be directly regulated by the Service through the proposed rule or by a delegation of impact from the directly regulated entity.

Our screening analysis focuses on small entities that may bear the incremental impacts of proposed critical habitat as quantified in Chapter 3 of the DEA (IEc 2013). As discussed in greater detail in Chapters 2 and 3, the incremental impacts of the designation



of critical habitat in this case are likely to be limited to administrative costs of section 7 consultations. Small entities may participate in section 7 consultation as a third party (the primary consulting parties being the Service and the Federal action agency). It is therefore possible that the small entities may spend additional time considering critical habitat during section 7 consultation for the species. Additional incremental costs of consultation that would be borne by the Federal action agency and the Service are not relevant to this screening analysis as these entities (Federal agencies) are not small.

To determine if any of the rules could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities, such as: Military activities; airport operations and agriculture; electricity and forestry activities; dredging; and recreation and habitat management. After determining which areas of economic activities may potentially be affected, we then apply the “substantial number” test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define “substantial number” or “significant economic impact.” Consequently, to assess whether a “substantial number” of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only has regulatory effects on activities authorized, funded, or carried out by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and will not be affected by critical habitat designation. If listed under the Act, in areas where any of the six prairie species are present, Federal agencies would already be required to consult with us under section 7 of the Act on activities they authorize, fund, or carry out that may affect the species. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities.

As described in Chapter 3 of the DEA, activities that may be affected by the designations include: Military activities; airport operations and agriculture; electricity and forestry activities; dredging; and recreation and habitat management. However, we do not expect critical habitat designation to result in impacts to small entities under the categories of military activities, dredging, transportation, or electricity distribution and forestry activities, for the reasons described here:

- *Military Activities.* Chapter 3 discusses forecast consultations between JBLM and the Service related to military training operations, JBLM's habitat restoration operations, and finalization of JBLM's INRMP. These consultations are expected to occur between staff at JBLM and the Service without third-party involvement. As JBLM is a Federal

entity, it is by definition not small, and thus no impacts to small entities are expected related to these consultations.

- *Dredging.* Chapter 3 discusses the potential for the U.S. Army Corps of Engineers (Corps) to incur incremental administrative costs associated with consultations addressing the Corps' dredging program in the lower Columbia River channel. These consultations are expected to occur between staff at the Corps and the Service without third-party involvement. As the Corps is a Federal entity, it is by definition not small, and thus no impacts to small entities are expected related to these consultations.

- *Transportation.* Chapter 3 discusses the potential for critical habitat to affect roadway construction and maintenance. These impacts are limited to consultations between State Departments of Transportation and the Service, and they are not expected to involve third parties. As State agencies are by definition not small entities, we do not expect any impacts to small entities related to transportation.

- *Electricity Distribution and Forestry Activities.* Chapter 3 discusses the potential for critical habitat designation to affect electricity distribution and forestry activities. The only electricity distribution activity within the proposed critical habitat is carried out by the Bonneville Power Administration (BPA). The BPA is a Federal entity and, therefore, is not considered small. As such, we do not anticipate impacts to small entities related to BPA's electricity distribution activities. The DEA forecasts no incremental costs for forestry activities. Therefore, we do not anticipate impacts to small entities related to such activities.

The DEA indicates that any estimated incremental impacts that may be borne by small entities are limited to the administrative costs of section 7 consultation related to airport operations, agriculture, and recreation and habitat management. These potential impacts are described below.

- *Airport Operations.* Chapter 3 of the DEA discusses the potential for this critical habitat designation to affect airports. Overall, 198 consultations are expected in relation to operations at seven airports over the next 20 years. Information on whether airports are considered small or large entities was available for some airports and not available for others. Information to determine whether individual airports are small entities was not available. For the purposes of the DEA, we make the simplifying and conservative assumption that all airports within the proposed critical habitat designations are small entities. These seven entities represent 3 percent of the total small Other Airport Operations (NAICS code 488119) entities within the proposed critical habitat designations. If all 198 consultations were spread evenly across the seven airports, the cost per entity to participate in forecasted consultations is approximately \$875 to \$8,750 in any given year, or 0.01 to 0.1 percent of annual revenues per small entity.

- *Agricultural Activities.* Chapter 3 of the DEA forecasts two projects related to agriculture, one at Rock Prairie and one on M-DAC farms, which may involve small entities within the proposed critical habitat designations over the next 20 years. Assuming that all agriculture and grazing impacts are borne by two small private entities,

this amounts to less than one affected entity per year. The per entity impact ranges from approximately \$875 to \$1,750, representing less than 2 percent of annual revenues.

*Recreation and Habitat Management:* Chapter 3 discusses the potential for critical habitat to affect recreational uses, particularly those associated with hiking, horseback riding, and dog walking, and habitat management efforts on State, local, and privately owned lands, and on JBLM lands. Incremental habitat restoration impacts are associated with administrative costs of consultation and do not include the cost of restoration actions. A diverse group of Federal and State agencies, county-level governments, and private nonprofit organizations may be subject to the administrative burden of these consultations. Federal entities are not considered small. Additionally, both counties potentially subject to administrative costs associated with these activities, Thurston and Benton Counties, Washington, have populations over 50,000 and do not meet the small entity size standard for government jurisdictions. Therefore, we forecast three such projects within the study area that may involve small entities—Wolf Haven International, Whidbey/Camano Land Trust, and the Pacific Rim Institute for Environmental Stewardship—over the next 20 years. Assuming that all recreation and habitat restoration impacts are borne by these three small private entities, this amounts to less than one affected entity per year. These three entities represent 9 percent of the total small Environment, Conservation and Wildlife Organizations (NAICS code 813312) entities within proposed critical habitat. The per entity impact, ranging from approximately \$875 to \$2,625, represents less than 1 percent of annual revenues.

Recreators at JBLM may incur unquantified losses in economic surplus in the form of reduced or restricted recreational use of JBLM lands proposed as critical habitat. However, because the recreators leasing JBLM lands are individuals, not entities, we do not address these impacts in our distributional analysis.

The Service's current understanding of recent case law is that Federal agencies are only required to evaluate the potential impacts of rulemaking on those entities directly regulated by the rulemaking; therefore, they are not required to evaluate the potential impacts to those entities not directly regulated. The designation of critical habitat for an endangered or threatened species only has a regulatory effect where a Federal action agency is involved in a particular action that may affect the designated critical habitat. Under these circumstances, only the Federal action agency is directly regulated by the designation, and, therefore, consistent with the Service's current interpretation of RFA and recent case law, the Service may limit its evaluation of the potential impacts to those identified for Federal action agencies. Under this interpretation, there is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated, such as small businesses. However, Executive Orders 12866 and 13563 direct Federal agencies to assess costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consequently, it is the current practice of the Service to assess to the extent practicable these potential impacts if sufficient data are available, whether or not this analysis is believed by the Service to be strictly required by the RFA. In other words, while the effects analysis required under the RFA is limited to

entities directly regulated by the rulemaking, the effects analysis under the Act, consistent with the E.O. regulatory analysis requirements, can take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable. In doing so, we focus on the specific areas proposed to be designated as critical habitat and compare the number of small business entities potentially affected in that area with other small business entities in the region, instead of comparing the entities in the proposed area of designation with entities nationally, which is more commonly done. This analysis results in an estimation of a higher number of small businesses potentially affected.

In summary, we have considered whether this designation, if finalized as proposed, will result in a significant economic impact on a substantial number of small entities. Information for this analysis was gathered from the SBA, stakeholders, and Service files. In these proposed rulemakings, we calculate that from 0.1 to 9 percent of the total small entities engaged in airport operations, agricultural activities, or recreation and habitat management may be affected if and when a final rule becomes effective (IEc 2013, p. A-7), and we do not consider this to be a substantial number of small entities. If we were to calculate that value based on the proportion nationally, then our estimate would be significantly lower. In addition, potential economic impacts to small entities are conservatively estimated as less than 2 percent of annual revenues for entities in the agricultural industry and less than 0.1 percent of entities in airport operations or environment, conservation, and wildlife organizations (IEc 2013, p. A-7), which we do not consider to be significant economic impacts. Following our evaluation of potential

effects to small business entities from these proposed rulemakings, we conclude that the number of potentially affected small businesses is not substantial, and that the economic impacts are not significant. Therefore, we are certifying that the designation of critical habitat for the six prairie species will not have a significant economic impact on a substantial number of small entities, and an initial regulatory flexibility analysis is not required. Recognizing that this analysis considered the potential impact of all six prairie species collectively, we additionally assert that by extension, the individual impact of any one of the six species under consideration will be even less; therefore we additionally certify that the designation of critical habitat for any one of the six prairie species—Taylor’s checkerspot butterfly, streaked horned lark, or Roy Prairie, Olympia, Tenino, or Yelm subspecies of the Mazama pocket gopher—will not have a significant economic impact on a substantial number of small entities, and an initial regulatory flexibility analysis is not required.

*Energy Supply, Distribution, or Use—Executive Order 13211*

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute “a significant adverse effect” when compared to not taking the regulatory action under consideration.



- Reductions in crude oil supply in excess of 10,000 barrels per day (bbls);
- Reductions in fuel production in excess of 4,000 barrels per day;
- Reductions in coal production in excess of 5 million tons per year;
- Reductions in natural gas production in excess of 25 million mcf (1,000 cubic feet) per year;
- Reductions in electricity production in excess of 1 billion kilowatts-hours per year or in excess of 500 megawatts of installed capacity;
- Increases in energy use required by the regulatory action that exceed the thresholds above;
- Increases in the cost of energy production in excess of 1 percent;
- Increases in the cost of energy distribution in excess of 1 percent; or
- Other similarly adverse outcomes.

As described in Chapter 3 of the DEA, the proposed critical habitat designation is anticipated to affect electricity distribution activities in seven subunits of proposed critical habitat, primarily for the Taylor's checkerspot butterfly. However, impacts to these activities are limited to the administrative costs of consultation, and no reductions in electricity production are anticipated. Furthermore, given the small fraction of projects affected (two consultations over 20 years), consultation costs are not anticipated to increase the cost of energy production or distribution in the United States in excess of 1 percent. Thus, none of the nine threshold levels of impact listed above is exceeded. As such, the designation of critical habitat is not expected to significantly affect energy

supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

### **Authors**

The primary authors of this notice are the staff members of the Washington Fish and Wildlife Office, Pacific Region, U.S. Fish and Wildlife Service.

**Authority**

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Date: March 26, 2013

Rachel Jacobson

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

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